

TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
MUR #6848)
FRIENDS OF GEORGE DEMOS)
)

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IN THE MATTER OF:)
)
MUR #6848)
FRIENDS OF GEORGE DEMOS)

Wednesday,
October 31, 2018

APPEARANCES :

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P R O C E E D I N G S

(10:12 a.m.)

CHAIR HUNTER: Good morning. The probable cause hearing for Matter Under Review 6848, George Demos, et al., will now come to order.

Representing Respondents George Demos, Friends of George Demos, and Robert Cole in his official capacity as Treasurer, and Chrysanthy Demos are Bob Lenhard and Derek Lawlor of Covington & Burling.

Welcome, gentlemen, and Happy Halloween.

On June 17, 2016, the Commission found reason to believe that George Demos violated 52 U.S.C. § 30116(f) and that Friends of George Demos and Robert Cole in his official capacity as Treasurer violated 52 U.S.C. §§ 30104(b) and 30116(f) in connection with excessive contributions totaling \$2.5 million and had been reported as candidate loans. The Commission began an investigation.

On July 17, 2018, the Commission found reason to believe that Chrysanthy T. Demos, the candidate's wife, made an excessive contribution to Friends of Demos, in violation of 52 U.S.C. 30116(a)(1)(A) in connection with the same funds.

On September 17, after pre-probable cause

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1. conciliation efforts did not reach an agreement, the
2 Office of General Counsel notified your clients that
3 OGC was prepared to recommend probable cause to
4 believe and sent its brief to you. On August --
5 excuse me. On October 3, 2018, you provided a reply
6 brief and requested a probable cause hearing, which
7 was granted.

8 To start today's hearing, you will have such
9 time as reasonably needed to make an opening statement
10 or presentation, 15 to 20 minutes, and you can reserve
11 time for a closing statement if you desire. We will
12 then have an opportunity to ask questions, and at that
13 time, the Commissioners may also ask clarifying
14 questions of the Office of General Counsel or the
15 Office of the Staff Director, if any. The transcript
16 will become part of the record and may be relied upon
17 for determinations made by the Commission, and
18 Commission will make a transcript of this proceeding
19 available to Respondent.

20 Thank you very much. And you may begin.

21 MR. LENHARD: Thank you. I'd like to
22 reserve three minutes at the end for closing remarks
23 or statements.

24 CHAIR HUNTER: Thank you.

25 MR. LENHARD: The theory of the case that

1 OGC has presented to you is a radical departure from
2 how these matters have been handled in the past. As
3 such, it's in conflict with the statute, the
4 regulations, and prior precedent. It is also
5 different from the theory presented to you in the
6 complaint, and even RTB.

7 The original complaint alleged Mr. Demos's
8 father-in-law, Angela Tsakopoulos, illegally gave Mr.
9 Demos the money he used to loan his campaign. We
10 denied that, stated that the loan had derived from a
11 joint account held with his wife, and OGC then sought
12 and granted an RTB vote under the theory that there
13 must have some secret way Mr. Tsakopoulos provided the
14 funds to Mr. Demos. That is the investigation
15 authorized.

16 We provided OGC with extensive documentation
17 of the family's finances and proved that our initial
18 assertion in opposition to the complaint was true.
19 Mr. Demos used funds from a joint account that he held
20 with his wife. The FEC has now abandoned the theory
21 that Mr. Tsakopoulos provided Mr. Demos with the funds
22 at issue and moved to dismiss Mr. Tsakopoulos and his
23 company, AKT Development, from the case.

24 Instead, OGC now advances a new theory.
25 Because Mrs. Demos transferred \$3 million dollars from

1 her personal funds to a joint bank account she held
2 with her husband three weeks before he became a
3 candidate, his later use of those funds after he did
4 become a candidate at various points in the campaign
5 over the next nine months amounted to an illegal
6 \$2,497,400 contribution by Mrs. Demos to a candidate
7 and campaign that did not then exist. This leads to a
8 somewhat confusing conclusion: that a personal asset
9 of a candidate of which he or she has legal title and
10 control over is not an asset if the FEC can later
11 infer a campaign-related motive in the acquisition of
12 that asset.

13 OGC relies exclusively on the timing of
14 events to prove motive. It also requires one to
15 ignore the reality of Mr. and Mrs. Demos' lives, their
16 marriage 16 months earlier, prior, 16 months prior to
17 Mr. Demos becoming a candidate, their purchase of a
18 home, again entirely with her funds, four months
19 before he became a candidate, and the birth of their
20 first child, again in the period of about a year
21 before he became a candidate, all reflecting the
22 knitting together of these two families at the very
23 same time.

24 We believe that there are at least four
25 reasons why you should reject this in theory. The

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1 first is that it is without support of the law.
2 There's a clear statutory rule repeated in the FEC's
3 regulations which states that the personal funds
4 available to a candidate are defined to include the
5 assets under applicable state law at the time the
6 individual becomes a candidate, the candidate has
7 legal right and access or control over, with respect
8 to which the candidate had legal and equitable title
9 and an equitable interest.

10 The regs were not written by Shakespeare.

11 This is a different standard than the one
12 for evaluating income that a candidate may use. For
13 assets, Congress set the relevant measure as a
14 candidate's rights under state law at the time they
15 become a candidate. For income, Congress set the
16 measure as per election cycle and required that
17 employment be modified, the gifts be customarily
18 received, and the trusts be established before the
19 election cycle.

20 We know here that the funds were used from a
21 joint account. The FEC's regulations provide that
22 ownership of assets in a joint account are determined
23 by the instrumentality of conveyance or ownership, and
24 in the absence of such, have one-half interest in the
25 property.

1 Under the FEC's interpretation of its
2 regulations, Mr. Demos had the right to 100 percent of
3 the assets in that account. This is because the FEC
4 has consistently concluded that the instrument of
5 ownership of a joint bank account is determined by
6 state law.

7 In every case involving joint bank accounts
8 under New York law, in every case involving joint bank
9 accounts under New York law, the FEC has concluded
10 that all the funds in the account are available in
11 their entirety to the candidate. This was the holding
12 in MUR 2292, the Stein matter. This was the holding
13 in MUR 2754, the Nita Lowey matter. And it has been
14 the Agency's holding under other state laws as well,
15 including MUR 3505, the Clink matter involving
16 Pennsylvania law, the Menor audit, which was
17 interpreted under Hawaii law, and the earlier Bower
18 one.

19 In fact, the New York Banking Law Treatise,
20 which both we and OGC cite in our briefs to you in
21 this case, is the very same section of that treatise
22 that the FEC cited in finding that Candidate Stein had
23 the rights to 100 percent of the assets in a joint
24 account in MUR 2292.

25 OGC argues that the Agency has been

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1 inconsistent on this point, and they cite the whole
2 MUR 4910, where the Commission declined to prosecute,
3 in part, because of the small sums at stake, and, in
4 part, because, as OGC noted, there were seven cases
5 where the FEC had attributed 100 percent ownership to
6 the candidate. But there was a way it might be
7 determined differently, and as a consequence, they
8 encouraged the Commission to decline prosecution, and
9 they did on that point.

10 The second matter they cite is the Udall
11 MUR, where the candidate proved that he had the rights
12 to the half interest -- of half interest under the
13 more stringent test, and therefore, the FEC dismissed
14 without looking to what other test was appropriate.

15 Neither of these decisions not to prosecute
16 serve as good precedent for the decision to prosecute
17 Mr. Demos in this matter. George Demos met the test
18 for personal funds and the right to 100 percent use.
19 At the time he became a candidate, he was a joint
20 owner of the bank account from which all of the funds
21 loaned to this campaign derived. There's nothing in
22 the decisional law, the regulations, or the guidance
23 that provides, as OGC suggests here, that a facts and
24 circumstances test to determine the origins of an
25 asset before one becomes a candidate is the

1 appropriate test to use.

2 There are sound reasons to draw a bright-
3 line at the point an individual becomes a candidate.
4 Before one becomes a candidate, the FEC's jurisdiction
5 is shaky. There are few places in the law where the
6 FEC has jurisdiction to regulate individual conduct
7 where no candidates or campaigns exist. The FEC has
8 limited regulations on testing the waters, and no one
9 argues that there are any facts in this case
10 suggesting that the testing of the water standards
11 applies here. But beyond that, the FEC has been
12 reluctant to regulate pre-candidacy activities, and
13 courts have frequently limited the Agency when it has
14 tried.

15 There are also good policy reasons for a
16 bright-line rule. Bright-line tests give people who
17 are considering becoming a candidate certainty that
18 they can continue to live their lives and operate
19 their businesses without concern that the FEC will
20 come in and second-guess transactions they have made
21 before they became a candidate.

22 This threat is not speculative. That is
23 what happened. That is what has happened here. Mr.
24 Demos was asked under threat of subpoena for financial
25 records of transactions between a father and his

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1 daughter, as well as the financial records between the
2 couple for 21 months before Mr. Demos became a
3 candidate and six months before Mr. and Mrs. Demos
4 were married. That, according to OGC, was the
5 appropriate period to review to help determine if this
6 pre-candidacy transaction might have been a
7 contribution. To repeat, the financial activity of
8 this family nearly two years before he became a
9 candidate was subject to discovery by this Commission
10 in this case. The risk of Agency overreach is real.

11 The second reason to dismiss this case is
12 the Due Process Clause. There is nothing in the FEC's
13 guidance documents, advisory opinions, or rules that
14 inform those considering becoming candidates that
15 their pre-candidacy financial transactions are open to
16 scrutiny for fairness in price and terms to test if
17 any of these transactions in retrospect may be deemed
18 contributions. As we detailed in our brief, the law,
19 the Agency's regulations, the guidance and advisory
20 opinions and decisional law are clear this new theory
21 is not the law. Consistent with the Due Process
22 Clause, the Agency may not pursue enforcement action
23 when the individual had no notice that the law
24 prohibited the conduct.

25 The third point I want to raise is the

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1 statute of limitations. The sole act that we know
2 that Mrs. Demos committed, the transfer of \$3 million
3 to the family's joint account, occurred prior to the
4 start of the campaign and more than five years ago.
5 There is no evidence that she had any involvement with
6 her husband's decision to transfer some of the funds
7 in the joint account to his campaign three to nine
8 months later. Presumably, OGC has a theory of how Mr.
9 Demos' actions as a candidate may be imputed to his
10 wife's action before he became a candidate but has not
11 yet articulated that theory to us. We believe the
12 statute of limitations apply as to her.

13 The last point I want to touch on is the
14 First Amendment. Even if you thought a pre-candidacy
15 payment could be a contribution, bringing a case where
16 the excessive contribution is from the spouse raises
17 the question whether the spousal contribution is still
18 good law, especially where, as here, there is no
19 colorable claim of quid pro quo corruption. And
20 testing a new legal theory in a case where the
21 underlying statute is on thin ice is unsound.

22 The Supreme Court looks at restrictions on
23 spending in political elections far differently today
24 than it did in 1976, when the Buckley decision was
25 decided. Even 40 years ago, the Court found this

1 provision stood on shaky ground. Since Wisconsin
2 Right to Life's admonition that enough is enough, it
3 has been clear that there is a majority on the Court
4 that use the First Amendment as having a direct and
5 powerful application to restrictions on political
6 spending, and since Citizens United and McCutcheon,
7 that only quid pro quo corruption is a basis to
8 prevent political contributions as speech. The
9 confirmations of Justice Gorsuch and Kavanaugh cement
10 this strategy.

11 So how will the bar on spousal contributions
12 fair? The marital relationship is treated differently
13 and more favorably throughout the law in FECA and in
14 your regulations. There are no facts here that will
15 support the notion that there are some risks of quid
16 pro quo corruption in Mrs. Demos making a contribution
17 of any size to her husband. If Congress were really
18 concerned about spousal quid pro quo corruption, why
19 is it permissible after the election for a spouse to
20 transfer all of her wealth to her now congressman
21 husband under the Congressional Gift Rules? We've
22 seen that the risk of corruption is far greater once a
23 member is elected, writing legislation and voting on
24 bills, but it is only in the context of canvassing that
25 this restriction exists.

1 Obviously, we understand this restriction
2 does not exist to prevent corruption. It was one of
3 the last vestiges of the post-Watergate reforms that
4 originally capped the amounts that a candidate could
5 raise and spend, limited independent expenditures, and
6 generally sought to limit the amount that individuals
7 could give in all elections. One cannot seriously
8 consider Buckley good law as to the spousal limits,
9 and certainly not as applied here.

10 In conclusion, OGC has proposed a theory
11 that we believe will rewrite the law, moving away from
12 a bright-line test that has been consistently followed
13 and towards a facts and circumstances analysis of
14 transactions before an individual becomes a candidate.
15 We see no support for this in the law, and strong
16 policy reasons to oppose it. At a minimum, doing so
17 in this matter will violate the Due Process Clause in
18 the First Amendment.

19 There is uncontroverted evidence that Mr.
20 Demos and his wife, Friends of George Demos, and
21 Robert Cole as Treasurer, complied with the law as
22 written and interpreted by the FEC. I think the FEC
23 should vote to dismiss this matter.

24 Thank you.

25 CHAIR HUNTER: Thank you, Mr. Lenhard.

1 Excellent presentation. I really appreciate it.

2 Anybody have any questions or comments?

3 Commissioner Walther?

4 COMMISSIONER WALTHER: Nice to see you
5 again.

6 MR. LENHARD: Good to see you.

7 COMMISSIONER WALTHER: Is there any instance
8 in which you can consider it appropriate to look
9 beyond the date of the declaration of candidacy to
10 make a determination as to whether or not there's been
11 an excessive contribution?

12 MR. LENHARD: The statute provides that in
13 determining the assets the candidate can use as
14 personal funds that it is the date of candidacy.
15 Congress also provided that, as to income, the Agency
16 could look over the entire election cycle.

17 So, as to assets, no, I think the statute is
18 clear that personal assets are determined as of the
19 date of candidacy.

20 COMMISSIONER WALTHER: Does testing the
21 water make any difference to that theory?

22 MR. LENHARD: I don't think so. No one has
23 argued that Mr. Demos engaged in any activity --

24 COMMISSIONER WALTHER: No, I understand
25 that. I'm just trying to find out how impervious that

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1 particular doctrine would be if there was no way,
2 particularly beyond the date of candidacy.

3 MR. LENHARD: Yeah. The Commission has
4 regulations that define certain kinds of conduct as
5 permissible testing the waters activities, and there's
6 been some dispute among Commissioners as to how valid
7 those regulations are. But they exist in the book.
8 And so I think that the Agency certainly has
9 regulations where it can look to see specific conduct
10 and determine whether a candidate is engaging in
11 testing the waters activity.

12 I mean, I don't think that's relevant to
13 this case. It simply points to the very, very limited
14 jurisdiction that Congress has given the Agency to
15 regulate conduct before people become candidates.

16 COMMISSIONER WALTHER: So what about foreign
17 money? Does it determine there's strong evidence that
18 there's foreign -- let's just talk theory because it
19 wasn't the case here.

20 MR. LENHARD: Sure.

21 COMMISSIONER WALTHER: But in case there was
22 such a situation where the spouse received that
23 directly from foreign sources, another member of the
24 family, for example --

25 MR. LENHARD: Yeah. I think there's a


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1 separate --
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2 COMMISSIONER WALTHER: -- would there be an
3 exception that could be made there?

4 MR. LENHARD: There's a separate provision
5 of the statute which prohibits foreign nationalists
6 from making contributions or expenditures in federal
7 elections, and so I think the Agency would then turn
8 to that part of the statute to determine whether it
9 had been violated.

10 COMMISSIONER WALTHER: But you'd need some
11 evidence to make that determination, and I'm just
12 wondering at that point what kind of procedural
13 approach would be taken when you are trying to make
14 that determination?

15 MR. LENHARD: Yeah. I mean, this is a
16 slightly broader question. But I think the most
17 powerful and effective tool this government has to
18 stop the use of foreign money in United States
19 elections is not the Federal Election Commission. I
20 think our national security apparatus is the most
21 powerful and useful tool we have available to us to
22 stop the involvement of foreign money in our elections
23 for exactly the reason you pointed to, which is that
24 they have a level of visibility and penetration into
25 those kinds of transactions that this Agency doesn't.

1 And the use of those tools is the most powerful weapon
2 we have to stop foreign money in American elections.

3 COMMISSIONER WALTHER: I can't disagree with
4 you to that effect, but sometimes we have the
5 responsibility ourselves to make some interpretations
6 on whether or not there's foreign money involved in
7 the transactions that are before us.

8 MR. LENHARD: Absolutely.

9 COMMISSIONER WALTHER: And at that point,
10 we're kind of stuck. We have to do it ourselves.

11 MR. LENHARD: Absolutely. I agree.

12 COMMISSIONER WALTHER: So, in that
13 particular case, we might be able to look at the facts
14 and circumstances of a matter to make a determination
15 as to whether or not there was foreign money there.

16 MR. LENHARD: Yeah, I don't -- I guess it
17 would -- I don't really want to speculate on how you
18 would want to pursue an enforcement action involving
19 other facts that we don't really have, but I do know
20 that you have a tool, a statutory tool, to use to try
21 and prevent the use of foreign money in American
22 elections.

23 COMMISSIONER WALTHER: Let me turn you
24 briefly to the issue of the unfettered right to use
25 that money that came from Mrs. Demos.

1 MR. LENHARD: Uh-huh.

2 COMMISSIONER WALTHER: Have we ever seen a
3 document that the bank was provided and assigned to
4 the bank as to who had what power to do what with that
5 particular account?

6 Unfortunately, I don't believe we've asked
7 for it in the past, so we may not have one. We can
8 answer any questions that exist regarding individual
9 rights to keep the money or not. You might have a
10 case where you have a joint account and the money
11 would be potentially able to be used by one person on
12 the account. But it could be that, once the money
13 comes in, one person might take the money back.

14 And I'm just wondering, is there any
15 guidance in any of the documents, which really are the
16 controlling documents, that he could spend money with
17 that bank money?

18 MR. LENHARD: Yeah.. So the FEC up until now
19 has looked to state law to decide whether a person who
20 is a joint account holder has the right to 100 percent
21 of those funds, and, up until now, it has relied on
22 state law to find that they do in New York in every
23 case. You also have in the record that Mr. Demos was
24 transferred those funds as a loan to his campaign
25 under his sole signature, in fact, separately and

1 relatedly transferred \$1 million from the joint
2 account from a personal account that he had at a
3 different bank for several months and then transferred
4 the funds back to the joint account.

5 So there is some evidence in the record
6 already that on his sole signature Citibank treated
7 that as a valid exercise of the right to withdraw
8 those funds. We have bank records. We have not
9 produced them because, up until now, we've not viewed
10 that as the appropriate legal test, but we could if
11 you wanted to, you know. And if the Commission
12 decided that it wanted to pursue a different legal
13 theory as to how to prove ownership, we could produce
14 records that would show that the Citibank account was
15 opened consistent with New York law and that either
16 person had the rights to those funds. But, again,
17 those agreements are consistent with the state law.

18 COMMISSIONER WALTHER: And under the
19 circumstances, the document could control New York law
20 in the sense that they could decide in the document
21 with the bank what can be done with that money.

22 MR. LENHARD: Yes.

23 COMMISSIONER WALTHER: Which would supersede
24 the statute.

25 MR. LENHARD: Yeah.

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1 COMMISSIONER WALTHER: And the essence of
2 the money.

3 MR. LENHARD: I assure you that is not the
4 case here. If the Commission would like documents
5 that would reflect that, we do have some.

6 COMMISSIONER WALTHER: That's all I have at
7 the moment.

8 CHAIR HUNTER: Commissioner Peterson?

9 COMMISSIONER PETERSON: Thank you, Madam
10 Chair.

11 In your submission, you do talk a bit about
12 testing the waters, and Commissioner Walther just
13 talked about how, at least in that context, the filing
14 of the statement of candidacy is not necessarily
15 dispositive about when an individual becomes a
16 candidate; that in the testing the waters arena there
17 may be statements made, amounts of money raised,
18 activities taken which may indicate that an individual
19 has become a candidate before the actual date on which
20 he or she files a statement of candidacy. And so, in
21 this particular case, you say that, you know, those
22 regulations and that legal construct isn't
23 particularly relevant here.

24 I take it -- is it your position that a
25 statement of candidacy should be -- there should be a

1 presumption, maybe a rebuttable presumption, but at
2 least a presumption, that that is the date on which
3 someone becomes a candidate unless there are -- in the
4 case of testing the waters, there are more overt acts
5 where individuals are making public statements,
6 appearing and speaking, establishing a committee to
7 raise substantial amounts of money, hiring
8 consultants, hiring staff, more overt acts, as opposed
9 to private conversations that may be taken between a
10 potential candidate and friends and family or, in this
11 case, maybe a spouse?

12 I just wanted to get your sense of where you
13 think -- how the Commission should handle that
14 question, because, like I said, in some contexts, we
15 haven't necessarily taken the statement of candidacy
16 as being the bright-line in all cases, and I just
17 wanted to get your thoughts on how you think the
18 Commission should address that question.

19 MR. LENHARD: Sure. Yeah, let me begin by
20 saying that that is not the legal theory that is being
21 presented to you today by OGC. The legal theory being
22 presented to you today by OGC is that an asset, a
23 personal asset of a candidate, is not, in fact, their
24 personal asset if the FEC can infer motive in the
25 acquisition of that asset. That's the theory that

1 you're being asked to support today, okay?

2 In more direct answer to your question, the
3 Agency has in the past in other enforcement matters
4 taken the statement of candidacy as the point at which
5 one becomes a candidate because that is the point at
6 which one says one is a candidate and a series of
7 regulatory obligations flow from that moment. But, if
8 you look at the Guinta case, the Commission
9 articulates over and over again that the statement of
10 candidacy is the benchmark at which they are
11 determining whether those rules apply. In the Hoffman
12 case, actually, the Agency did not pursue a
13 transaction that occurred before the filing of a
14 statement of candidacy, early in case, but by the time
15 you settled it you dropped that one out.

16 So there are a number of points where you
17 can look back and say the Agency has in the past
18 treated the statement of candidacy as the point at
19 which to make this determination.

20 In other enforcement cases in other fact
21 patterns, if you were testing -- if you were
22 determining whether someone is testing the waters and
23 has crossed the line to determine whether they've
24 actually become a candidate under the testing the
25 waters regulations, yes, the Agency has looked at a

1 variety of different behaviors that people who were
2 testing the waters engaged in to determine whether
3 their statement of candidacy was filed at the correct
4 date or not. But that strikes me as a very different
5 test than what's before us today and built upon very,
6 very different fact patterns than what you're
7 presented with.

8 COMMISSIONER PETERSON: Okay. You mentioned
9 in your opening statement that the timing of events is
10 being used to prove motive.

11 MR. LENHARD: Uh-huh..

12 COMMISSIONER PETERSON: And I believe it's
13 on page 7 of OGC's brief where it kind of goes through
14 that chronology and talks about, you know, that the
15 joint account was established on June -- I mean,
16 excuse me, on August 27. Then Mr. Demos' 2012
17 committee was terminated on September -- or excuse me.
18 There was a request for termination on September 1.
19 That request was approved on September 6, and then
20 that was -- it was on that same day when \$3 million
21 were transferred into the joint account. I guess the
22 inference being that there was some sort of -- there
23 was a conscious attempt to get that termination first,
24 and once we could get that, then you could say, I was
25 no longer a candidate, and now I can transfer that

3 Again, you're saying that the timing of
4 events is being used to ascribe motive. Is there
5 anything that we should read into the time by which
6 the account was set up, the termination request was
7 made, the termination was established, the money was
8 transferred, and so forth, since they happened in
9 relatively close proximity?

21 And so there's a bit of cherry-picking of
22 the facts to create that sequence and to create that
23 inference of motive, again, to build upon a legal
24 theory that this Agency should ignore the statutory
25 bright-line and for assets look back and try and infer

1 motive for transactions that occur prior to one
2 becoming a candidate.

3 And I will highlight that there is no
4 temporal limit to this. There is no temporal limit to
5 the time period in which OGC or this Commission under
6 this theory will be able to look back at transactions
7 and make a post hoc assessment of whether they were
8 for the purpose of influencing the election or for
9 commercial purposes, timing, price, terms and
10 conditions, purchase and sale of assets, homes,
11 airplanes. All of these things are things that under
12 this theory you are free to second-guess, and I think
13 that that is in conflict with what the statute says
14 and what your regs say and how those rules have been
15 interpreted up until this point.

16 COMMISSIONER PETERSON: So I definitely hear
17 what you're saying in the sense that -- and
18 maintaining clear bright-lines has been something that
19 I've always tried to ascribe to the greatest extent
20 possible for a variety of reasons. I think it
21 promotes and upholds the ideal of the rule of law,
22 which provides notice to those who are subject to the
23 law to know what is prohibited and what is permitted
24 and also places limits on decision-makers so that
25 there isn't arbitrary decision-making and arbitrary

1 enforcement of the law.

2 And so, in this particular case, I'm having
3 to look at the particular issue of, you know, should
4 the bright-line -- I guess I would ask this
5 hypothetically because I don't think this is your
6 argument.

7 But let's say hypothetically there were an
8 individual who was conducting financial transactions,
9 and they were doing so for the purpose that they could
10 utilize certain assets in connection with an election
11 that they would declare later on.

12 Is it your position that even if -- in those
13 circumstances, even if that individual was in an
14 arrangement with, whether it's a spouse, whether it's
15 with a parent or so on, that transactions are being
16 made for the purpose of influencing an election and to
17 be used in connection with an upcoming election, that
18 that still would be outside the Commission's
19 jurisdiction prior -- you know, until that person
20 becomes a candidate because that's just the way the
21 law and the regulation is written at this point?

22 And if Congress wants to change it, they can
23 change it. If the Commission wants to change the
24 regulations, they can change them. But as it stands
25 right now, the candidacy, the statement of candidacy,

1 you know, with the testing the waters exception
2 notwithstanding, that's the bright-line, and what
3 happens before that the Commission just doesn't have
4 the jurisdiction to look into that?

5 MR. LENHARD: So I guess one point I'd like
6 to emphasize is that this is not a rulemaking. You're
7 making a prosecutorial enforcement decision based upon
8 the facts and the law in this particular case as to
9 whether to proceed with this case or not. And I think
10 that the facts and law in this case counsel for
11 dismissal; that there is thin temporal evidence as to
12 motive; that you have a clear written statute and
13 regulations that permit the conduct that occurred
14 here; and that there are significant due process and
15 First Amendment issues that underlie this as well.

16 And based upon the totality of that, that
17 the decision whether to proceed with prosecution of
18 this matter, that a sound decision is to vote against
19 it, and I think that that's the decision. And I don't
20 think that that forestalls or prevents you from making
21 some different decisions on a future case involving
22 some different fact pattern.

23 I think in the contrary that if you decide
24 you are going to pursue this case under the theory
25 that the FEC has jurisdiction to second-guess

1 financial transactions prior to one becoming -- before
2 one becomes a candidate in contrast to the statute,
3 then you, in fact, need to give notice to the public
4 that that is, in fact, the way this Agency is going to
5 read that section, because that is not what is clear
6 today. No one thinks that is true. There's nothing
7 in the Agency's guidance, documents, enforcement cases
8 that teach people that's the line that they should
9 follow, okay?

10 So I think that this in some way is a
11 simpler question to answer than the one you posed
12 because you're not writing a rule for all time...
13 You're deciding whether to pursue this case or not,
14 and for all the reasons I say that you should not but
15 that, if you do, you are changing the standards of
16 rule that people who are not candidates today need to
17 govern their financial lives on, and not for 19 days
18 but for two years. That's what the discovery period
19 was in this case. And that's really I think what's,
20 you know, what's before you now.

21 COMMISSIONER PETERSON: That's all I have
22 right now.

23 Madam Chair?

24 CHAIR HUNTER: Madam Vice Chair?

25 VICE CHAIR WEINTRAUB: Hi.

1 MR. LENHARD: Hey. Great new offices, by
2 the way.

3 VICE CHAIR WEINTRAUB: Glad you like them.

4 MR. LENHARD: Very popular with staff too,
5 I can tell you from an informal poll today.

6 VICE CHAIR WEINTRAUB: Oh, okay. Well,
7 that's good to know.

8 MR. LENHARD: Everything but the commute.

9 VICE CHAIR WEINTRAUB: Yes, the location is
10 not quite as good. That is true. But it's nice to
11 work in a new building.

12 MR. LENHARD: Yes.

13 VICE CHAIR WEINTRAUB: So I want to probe
14 the limits of your legal theory.

15 So, if we had a case in front of us where
16 wife deposits \$3 million into a joint bank account --
17 they've been married for a year and a half, and she
18 hasn't done it yet, but she decides on this particular
19 day she's going to put \$3 million into a joint bank
20 account. The very next day, the husband decides to
21 run for office and transfers the entire \$3 million
22 into his campaign account. Do you think we should not
23 look into that; that's beyond our purview?

24 MR. LENHARD: Would it affect your thinking
25 if she had invested \$2.5 million in a home for the

1 family four months earlier?

2 I mean, I guess my point is simply that this
3 transaction occurred in a context of two people who
4 were joining their families together, and so the
5 transfer of those funds does not strike me as
6 particularly unusual.

7 And, in fact, you did look into it. You did
8 do the RTB. We've done discovery for an extensive
9 period of time. You've asked for and we have produced
10 bank records and financial records of these folks for
11 an extensive period of time. So, in fact, the Agency
12 has looked into this.

13 VICE CHAIR WEINTRAUB: So we shouldn't do
14 anything about it? That's your position?

15 MR. LENHARD: Yeah, I think that the law is
16 clear. I think that you've got a clear statute that
17 says that this transaction was permissible.

18 VICE CHAIR WEINTRAUB: So, under the
19 scenario that I outlined, do you think in that
20 circumstance also we should come to the same
21 conclusion and dismiss on prosecutorial discretion?

22 MR. LENHARD: I'm sorry, I'm not sure I got
23 all the facts in your hypothetical. I thought that
24 they were essentially the facts in this case.

25 VICE CHAIR WEINTRAUB: A little bit.

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1 different. I'm just tightening up the time lines.

2 CHAIR HUNTER: I was going to ask you. It's
3 just a shorter time line?

4 VICE CHAIR WEINTRAUB: Yeah.

5 MR. LENHARD: I'm sorry. How many days?

6 VICE CHAIR WEINTRAUB: One day.

7 MR. LENHARD: One day?

8 VICE CHAIR WEINTRAUB: Yes. So let's say
9 wife deposits \$3 million into a bank account one day.
10 The very next day, the husband declares candidacy,
11 transfers the entire \$3 million, so I'm changing the
12 facts a little bit, into a -- into his campaign
13 account. And is it your position that we should say,
14 well, that was the day before. This is the day after.
15 There's nothing there for us to look into or pursue?

16 MR. LENHARD: Yeah. I guess my position is
17 the same as I articulated with Commissioner Peterson,
18 which is that that's not the decision you have to make
19 today. The decision you have to make today is whether
20 you want to pursue a prosecution in this particular
21 case with this particular fact pattern, okay? And --

22 VICE CHAIR WEINTRAUB: I'm trying to figure
23 out -- you're proposing -- you're sitting --

24 MR. LENHARD: No.

25 VICE CHAIR WEINTRAUB: No, no, no. You're

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1 sitting there and you're saying this is how you
2 interpret the law and you're saying this is how we
3 should interpret the law, and I'm trying to probe the
4 limits of that theory.

5 MR. LENHARD: I am saying that this is the
6 way the statute is written, and this is the way the
7 Agency has interpreted this law, the statute, and the
8 prior enforcement patterns involving personal use from
9 joint funds prior to the person becoming a candidate.
10 This is how the Agency has interpreted the law. It's
11 not my theory. It's the Agency's approach to these
12 cases.

13 VICE CHAIR WEINTRAUB: So you're not going
14 to answer the question?

15 MR. LENHARD: Yeah, I don't think it's --
16 yeah. Well, I think I have answered the question.

17 VICE CHAIR WEINTRAUB: Well, I don't think
18 you have. I think --

19 MR. LENHARD: I do not feel comfortable
20 voting on a hypothetical matter that I don't have the
21 facts for and where we cherry-picked some of the facts
22 in this case. So I guess the answer is no.

23 I think that in this case that there's a --
24 that you are presented with a far more complicated set
25 of fact pattern here; that the evidence of intent is

1 circumstantial at best. It's based solely upon the
2 temporal nature of this, and that there are
3 temporal -- that there are other events that occurred
4 in that same temporal time period that are being
5 ignored.

6 VICE CHAIR WEINTRAUB: I disagree with that.
7 I mean, I'm not sure what the relevance is of Mrs.
8 Demos having paid for a new house for them. So why
9 should that influence whether it's okay for her to put
10 money in a bank account and then for him to use that
11 money for his campaign? What has the house got to do
12 with it?

13 MR. LENHARD: I guess it's because the
14 inference from the placement of the funds in the
15 campaign -- that months later are used for the
16 campaign is that the purpose was to influence the
17 election, and the value of the fact that there are
18 other financial transactions occurring at the same
19 time weakens this inference; that the temporal nature
20 alone proves intent.

21 VICE CHAIR WEINTRAUB: Is it your position
22 or is it true that at the time Mrs. Demos put the
23 money in the joint bank account, that that action on her
24 part had nothing to do with her husband's prospective
25 candidacy?

1 MR. LENHARD: I don't know what Mrs. Demos'
2 intent was. There's been no discovery as to that
3 question. There's nothing in the record. I
4 personally don't know the answer to that question.

5 VICE CHAIR WEINTRAUB: Well, I mean, we have
6 affidavits from the candidate and from his wife and
7 from the father-in-law, but none of them address this
8 particular issue of why this money was moved at this
9 time, because I have a hard time ignoring the sequence
10 of events. It's lovely that they got married and
11 they're forming a family and they bought a nice new
12 house and they had a baby. But this \$3 million wasn't
13 used for any of those purposes. The bulk of this
14 money was used to support his candidacy.

15 And I personally think it's relevant if this
16 was all a chain of events that was set up in advance
17 where they moved the money and he waited to declare
18 candidacy for what he may have thought was a
19 respectable amount of time after the money was moved,
20 and then he used substantially all of the money, two-
21 and-a-half out of the \$3 million, for his campaign.
22 And what you're saying is I should just ignore that
23 sequence of events and pretend that it had something
24 to do with their baby, but it didn't. I mean, the
25 money wasn't used for their baby. It wasn't used to

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1 buy a new crib for the nice new house.

2 MR. LENHARD: Well, in fact, some of it was,
3 but --

4 VICE CHAIR WEINTRAUB: Well, okay, maybe
5 half a million out of the \$3 million, but two-and-a-
6 half million was used for the campaign.

7 CHAIR HUNTER: Commissioner Walther?

8 COMMISSIONER WALTHER: Thank you, Madam
9 Chair.

10 We have some other issues from the facts
11 floating around, and that is the comments made by him,
12 himself, if we are to believe him, believable or not
13 believable as to veracity. But that he was basically
14 saying, don't worry, I've got the money. It's family
15 money. I mean, people who know me know I didn't have
16 money on my own. I guess one has to when the decision
17 came up -- or the question came up, he seemed to be
18 quite up front with respect to the fact that now we've
19 got money, and I can run this thing.

20 So can we ignore things like that, rather
21 than say we can be suspicious and begin to start
22 issuing subpoenas when it's right in your face like
23 that? Can we go to that point?

24 MR. LENHARD: Well, you did. You know, you
25 voted RTB and an investigation was conducted. I think

1 Mr. Jesse Garcia's affidavit, the statements he -- the
2 sworn statements he made in his complaint are
3 unreliable. I think they've been shown to be
4 unreliable. It was a campaign eve broad -- election
5 eve broadside by him against a candidate he opposed,
6 and much of what he alleged has proved to be false.
7 His allegations were that Mr. Demos told him that the
8 money was coming from his father-in-law, and we've now
9 proved --

10 COMMISSIONER WALTHER: I guess the question
11 is, can we consider it enough to find out whether it's
12 true or false or not?

13 MR. LENHARD: Well, you did.

14 COMMISSIONER WALTHER: I know we did. But
15 let's say, in the world of Bob Lenhard, could we have
16 appropriately done that, made that inquiry?

17 MR. LENHARD: Well, I think you should have
18 voted against RTB and dismissed this case years ago.
19 You didn't. The theory then presented to you was that
20 Mr. Tsakopoulos had somehow secretly maneuvered this
21 money in a way that Mr. Demos' counter-affidavit
22 didn't quite touch or tie on in all the possible
23 circumvention rules that might have been used.

24 And so we went through discovery and we did,
25 in fact, prove that Mr. Garcia's allegations that Mr.

1 Tsakopoulos had funded these loans was false, and that
2 you have, in fact, dismissed Mr. Tsakopoulos from this
3 case as a result of that discovery process.

4 So I guess to a certain extent the discovery
5 process was useful and constructive in that way.

6 COMMISSIONER WALTHER: But I guess that's
7 the point. Can it ever be useful and constructive in
8 helping us resolve a matter?

9 And I disagree in this particular case that,
10 well, maybe it was something that was not particularly
11 persuasive, even if it didn't go anywhere, but
12 sometimes it can. And I just was wondering how the
13 question was handled and how we get there.

14 MR. LENHARD: Yeah. Well, that was
15 certainly what the RTB process was for, and the Agency
16 conducted, you know, discovery and has produced the
17 proposal they have before you today.

18 CHAIR HUNTER: One of the issues you
19 discussed is that there's no temporal limit, and
20 that's one of the things that troubles me the most in
21 this case. I mean, this was close to the time that he
22 declared candidacy, but to your point, should we be
23 looking at transactions that happened two or more
24 years before somebody, you know, decided to run for
25 election? And that's troublesome to me.

1 What if they had sold their house? You
2 know, they had a joint asset, a home, that they sold a
3 year before. Are we then going to look back and say,
4 well, did you sell that house so you could amass some
5 money to run for election? You decided a year later
6 to do that. And you could probably, you know, infer
7 that the person was planning on doing it. Maybe they
8 started going to political party events and, you know,
9 glad handing at the Christmas parade. So we could
10 probably, you know, read that in to anybody, as you
11 mentioned earlier.

12 And I know Peterson asked you a few
13 questions about this. At what point is it appropriate
14 or inappropriate for us to dig into whether or not the
15 asset had a campaign-related motive, and what if it
16 did, I mean, before candidacy? That's the thing that
17 I'm struggling with the most. And I think you
18 probably figured this out. A few of our questions,
19 you know, directly relate to this case, but some of
20 them are more about what happens with other cases,
21 obviously. And there's a couple pre-candidacy
22 ramifications that may affect other cases here, as
23 you've surely figured out.

24 So what are your thoughts on that, the
25 temporal limits, again? I know you've already

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1 addressed it before, but that's one of the things that
2 concerns me the most.

3 MR. LENHARD: Yeah. No, I mean, I think in
4 a world where opposition research and opposition
5 research fueled complaints to the FEC is increasingly
6 part of your docket, it shouldn't, because it does
7 raise the specter that all of the financial activities
8 of people who are becoming candidates are subject to
9 review and evaluation by a host of research teams and
10 the creation of complaints with expert testimony
11 asking you to revisit these transactions from the
12 accompanying press attention is part of the highly
13 competitive political environment we're living in
14 right now, and that you should expect that, and that
15 there is no reasonable constraint upon how far back
16 one can go if the facts can create the inference that
17 the proper price was not paid or the proper terms of
18 the agreement were not met; that there was something
19 special about this transaction, therefore, the FEC
20 should go dig in to it and find out what was really
21 going on.

22 So I do think that that is a real threat;
23 that if you have the opportunity to do that, people
24 will use it in an effort to gain political competitive
25 advantage, and those cases will then become yours.

1 There, I don't think, is a reasonable
2 temporal limit to this. You could try and say, well,
3 just do it for the election cycle or six years for a
4 Senate election cycle to try and create some sort of
5 temporal limit. But it's artificial, and it's not
6 built upon any sort of statutory basis. It would
7 simply be something you are constructing, and I think
8 that there's real risk to that.

9 CHAIR HUNTER: Thank you. And part of your
10 point with respect to the assets part of this is that
11 there's no reason to look into the motive if the
12 assets are given to the candidate before the person
13 declares candidacy, right?

14 MR. LENHARD: Yeah.

15 CHAIR HUNTER: It's not a relevant inquiry
16 from your perspective?

17 MR. LENHARD: Yeah. And, well, I think from
18 Congress's perspective. I mean, I think you look at
19 the way they drafted the restrictions on income and
20 assets. They're different, and I think they're
21 different for a reason, that Congress was willing to
22 give this Agency much more freedom to investigate
23 people who do transactions on the income side, but for
24 whatever reasons, as to assets, there was a much
25 clearer bright-line rule crafted.

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1 CHAIR HUNTER: Okay. Thank you.

2 Madam Vice Chair?

3 VICE CHAIR WEINTRAUB: Just one question,
4 which I'm sure you're not going to answer.

5 MR. LENHARD: How cynical.

6 (Laughter.)

7 VICE CHAIR WEINTRAUB: Is it your client's
8 position that Mr. Demos had not decided to run for
9 office at the time the \$3 million was deposited into
10 the joint checking account?

11 MR. LENHARD: I don't know the answer to
12 that question.

13 VICE CHAIR WEINTRAUB: See, I told you you
14 weren't going to answer.

15 MR. LENHARD: I said I don't know.

16 CHAIR HUNTER: You don't have to answer if
17 you don't know.

18 VICE CHAIR WEINTRAUB: Well, it's just that,
19 unfortunately, we don't have your client here, so
20 you're the only person I can ask.

21 MR. LENHARD: There was never a question
22 raised in discovery during the multiple years we've
23 been since the vote on RTB.

24 CHAIR HUNTER: Commissioner Walther?

25 COMMISSIONER WALTHER: Given our

3 CHAIR HUNTER: Steve, before we turn to
4 them, can I ask --

6 CHAIR HUNTER: Now you just made me forget
7 what my question was.

9 COMMISSIONER WALTHER: Absolutely.

24 MR. LENHARD: Yeah, we actually discussed
25 this internally within the firm during the case, and I

1 don't know whether from your perspective it's a wise
2 decision or not, but it would have been, I think,
3 helpful in this case, which is there is a -- you
4 created a process in the audit experience to allow
5 people to raise questions of fault to the Commission
6 during the audit to determine whether the
7 Commission -- the Commissioners themselves, the four
8 Commissioners, understand the law in a particular way
9 or not.

10 And in this matter, we felt that there
11 was -- that we and OGC were in conflict as to what the
12 rule of law was, and it would have been helpful, I
13 think, in some ways to have had some mechanism to
14 raise that issue at that time. We thought about
15 different procedural steps, but there wasn't really an
16 elegant way to do that with the existing rules. And
17 you all need to consider -- balance many, many factors
18 as to whether you would actually want to create such a
19 system or not. There was one thought that we just
20 made it internally as we were going through this
21 process of whether it would help streamline and
22 produce better results.

23 CHAIR HUNTER: I appreciate that. That's an
24 excellent suggestion, and it's one of these things
25 that makes it harder for me to find RTB, because

1 sometimes it turns into, you know, a long
2 investigation and one that we don't really have a
3 chance to weigh in on until, you know, way further
4 down the process. So I appreciate your suggestion.

5 Commissioner Walther?

6 COMMISSIONER WALTHER: There would be, I
7 think, an onset of a certain amount of cases we would
8 not be able to take on, but in the interim we could
9 take a look at how we might do something, with
10 possible deadlock at that point. But at least, as you
11 know, we wouldn't have a chance to start considering
12 the issue as it applies to that case.

13 MR. LENHARD: And even then -- if there's a
14 deadlock on the legal theory that underlies the basis
15 of the investigation, it probably would be more
16 efficient to know that earlier rather than later.

17 COMMISSIONER WALTHER: Well, maybe we'll
18 consider an approach like that. We haven't done that.

19 I do want to ask Office of General Counsel
20 before we end this matter how they view the
21 limitations that we have, if any, in going forward to
22 look at facts that existed before the statement of
23 candidacy, because that really, to me, calls into
24 question when should we look at these facts, what
25 facts can we look at in order to make that part of our

1 decision-making process.

2 MS. STEVENSON: Thank you, Commissioner
3 Walther. I believe that that argument in particular
4 is addressed in the General Counsel's brief before the
5 Commission, and we'd be happy to provide further legal
6 advice to the Commission in a different context. And,
7 obviously, we'll take that into consideration in
8 whatever the next document is we prepare for the
9 Commission on any notice.

10 COMMISSIONER WALTHER: Well, in this
11 particular case, we've gone back and forth with each
12 other over whether or not we could look at the intent
13 as maybe sometimes superseding any rule we have about
14 beginning consideration at the date of candidacy, and
15 I don't think the document really covered that
16 approach in that way. It would seem we just went
17 ahead and did it.

18 But, as a matter of policy, what issues do
19 you see regarding your thinking in this process, and
20 then secondly, I guess, I'd be interested to know your
21 thoughts on Constitutional issues, referring to former
22 Commissioner Lynn.

23 MS. STEVENSON: Commissioner Walther, I'd be
24 happy to provide that legal advice in a different
25 context. I think that those arguments will be taken

1 into consideration in the next document that we
2 prepare for the Commission. So I'm not sure this is
3 the forum in which you want us to give you legal
4 advice in response to the arguments that have been
5 presented on the fly.

6 CHAIR HUNTER: Can I add to your question,
7 Steve, if you don't mind? I think maybe this will
8 help, Steve.

9 To the Office of General Counsel; have there
10 been any arguments today that are different from what
11 Mr. Lenhard and his colleagues have presented in the
12 briefs? It seems to me that, you know, he did an
13 excellent job of summarizing it, but they're the same
14 arguments. And in the interest of time, because of
15 the statute of limitations, you know, if you're not
16 comfortable answering, that's one thing, but I for one
17 am okay if you answer in this forum if you feel it's
18 appropriate.

19 Again, I don't believe you've raised any new
20 arguments.

21 MR. LENHARD: No. We tried not to.

22 CHAIR HUNTER: Okay. Sorry, Steve. I
23 didn't want to interrupt, but that might help distill
24 your question.

25 Office of General Counsel have any comments?

1 MS. STEVENSON: In response to your specific
2 question, I believe that's correct, that there's not
3 been any new arguments presented today that were not
4 incorporated in briefs before the Commission.

5 CHAIR HUNTER: So the plan of the Office of
6 General Counsel is to do an additional brief after the
7 hearing?

8 MS. STEVENSON: We have not made that
9 determination yet. The process of the hearing is to
10 take into consideration what our next recommendation
11 is going to be.

12 CHAIR HUNTER: Okay. Thank you.

13 Mr. Lenhard, you asked for a few minutes at
14 the end to summarize. Would you still like to do
15 that?

16 MR. LENHARD: Just briefly to say that we
17 appreciate you taking the time and giving us this
18 opportunity. I was around when this idea was first,
19 you know, contemplated, and from our perspective, this
20 has been extremely helpful with the procedural
21 process. And we thank you for the time that you put
22 into making this possible for us.

23 CHAIR HUNTER: Thank you very much for
24 coming. It was very useful for us as well. Thank
25 you.

1 MR. LENHARD: Thank you.

2 CHAIR HUNTER: Parties are adjourned.

3 (Whereupon, at 11:10 a.m., the probable
4 cause hearing in the above-entitled matter adjourned.)

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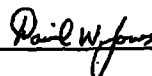
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REPORTER'S CERTIFICATE

DOCKET NO.: N/A
CASE TITLE: MUR #6848 - Friends of George Demos
HEARING DATE: October 31, 2018
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Election Commission.

Date: October 31, 2018



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